LIBRARY
SUPREME COURT, U. S.

Supreme Court, U. S.
FILED
SEP 25 1972
E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM — 1972

No. 71-322

IN THE MATTER OF THE COMPLAINT OF
UNTERWESER REEDEREI, GMBH,
FOR EXONERATION FROM OR LIMITATION
OF LIABILITY AS OWNER OF THE M/S BREMEN
UNTERWESER REEDEREI, GMBH,

Petitioner;

v.

ZAPATA OFF-SHORE COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS FOR
THE FIFTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

JAMES K. NANCE OF
BAKER & BOTTS
3000 One Shell Plaza
Houston, Texas 77002
and
DEWEY R. VILLAREAL, JR., of
FOWLER, WHITE, GILLEN,
HUMKEY, KINNEY &
BOGGS, P.A.
P. O. Box 1438
Tampa, Florida 33601
Attorneys for Respondent,
ZAPATA OFF-SHORE COMPANY

FIDELITY PRINTING COMPANY, INC., HOUSTON

TABLE OF CONTENTS
AND OTHER AUTHORITIES CITED

	PAGE
OPINION BELOW	1
JURISDICTION	2
QUESTION PRESENTED	2
STATEMENT	2
SUMMARY OF ARGUMENT	5
ARGUMENT	6
INTRODUCTION	6
THE DECISION BELOW IS CORRECT	7
The District Court Properly Denied Unterweser's Motion to Stay Because the Forum Clause is Non-exclusive and in Any Event Could Not Bar Zapata from Prosecuting a Claim in the Limitation Suit Unterweser Commenced	7
The District Court Properly Denied Unterweser's Motion to Stay Because Unterweser Had Submitted Itself and the Entire Controversy to the District Court's Jurisdiction by Filing the Limitation Suit, Procuring the Issuance of a Limitation Injunction, and Counterclaiming against Zapata	8
The District Court Properly Denied Unterweser's Motion to Stay Because the Record Shows It Would be Unreasonable to Enforce the Forum Clause. The Practical Result of Enforcement Would be to Deprive Zapata of a Remedy It Possesses in the American Court Under American Law	11
The District Court Properly Denied Unterweser's Motion to Stay Because the Balance of Convenience is Strongly in Favor of Trying This Controversy in the American Court. To Enforce the Forum Clause Would be Unreasonable	14
THERE IS NO CONFLICT OF DECISIONS	16
NO QUESTIONS OF IMPORTANCE ARE INVOLVED	20
CONCLUSION	24
CERTIFICATE OF SERVICE	25

TABLE OF CASES

	PAGE
Anastasiadis v. S. S. Little John, 346 F.2d 281 (5th Cir. 1965), cert. den. 384 U.S. 920	21
Bisso v. Inland Waterways Corp., 349 U.S. 85 (1955)	12
British Transportation Commission v. United States, 230 F.2d 139 (4th Cir. 1956), aff'm'd 354 U.S. 129 (1957)	10
Carbon Black Export, Inc. v. The SS Monrosa, 254 F.2d 297 (5th Cir. 1958)	21
Central Contracting Co. v. Maryland Casualty Co., 367 F.2d 341 (3rd Cir. 1966)	6, 12, 18, 20, 21
Chemical Carriers, Inc. v. L. Smit & Co.'s Internationale Sleepdienst, 154 F.Supp. 886 (S.D. N.Y. 1957)	11
Deep Sea Tankers v. The Long Branch, 258 F.2d 757 (2d Cir. 1958), cert. den. 358 U.S. 933 (1958)	9
Dixilyn Drilling Corp v. Crescent Towing & Salvage Co., 372 U.S. 697 (1963)	12
A. C. Dodge, Inc. v. J. M. Carras, Inc., 218 F.2d 911 (2d Cir. 1955)	10
General Motors Overseas Operations, et al. v. S.S. Goettingen, et al., 225 F.Supp. 902 (S.D. N. Y. 1964)	12
Gulf Oil Corp. v. Gilbert, 330 U.S. 501 (1947)	15
Hartford Accident & Indemnity Co. v. Southern Pac. Co., 273 U.S. 207 (1927)	10
Hawaii Credit Card Corp. v. Continental Credit Card Corp., 290 F.Supp. 848 (D.C. Hawaii 1968)	14
Indussa Corp. v. S.S. Ranborg, 377 F.2d 200 (2nd Cir. 1967)	21
National Equipment Rentals Ltd. v. Szukhent, 375 U.S. 311 (1964)	6, 16, 17, 20
Oceanic Steam Nav. Co. v. Corcoran, 9 F.2d 724 (2nd Cir. 1925)	13, 23
Stevens v. The White City, 285 U.S. 195 (1932)	13
The Belgenland, 114 U.S. 355 (1885)	13
The Chickie, 141 F.2d 80 (3rd Cir. 1944)	9
The Gylfe v. The Trujillo, 209 F.2d 386 (2nd Cir. 1954)	13
The Kensington, 183 U.S. 263 (1902)	13, 22
The Monrosa v. Carbon Black Export, Inc., 359 U.S. 180 (1959)	7

PAGE

The Salvore, 36 F.2d 712 (2d Cir. 1929) 10
The Scotland, 105 U.S. 24 (1881) 12
The Titanic, 233 U.S. 718 (1914) 13
The Western Farmer, 210 F.2d 754 (2nd Cir. 1954) 13
Wm. H. Mullet & Co., Inc. v. Swedish American Line Ltd., 224 F.2d 806 (2d Cir. 1955) 6, 11, 12, 17, 18, 20, 21

OTHER AUTHORITIES

6A Corbin on Contracts, § 1445 (1967) 8
Anno., 56 A.L.R 2d 300 (1957) 8

IN THE

Supreme Court of the United States

OCTOBER TERM — 1972

No. 71-322

IN THE MATTER OF THE COMPLAINT OF
UNTERWESER REEDEREI, GMBH,
FOR EXONERATION FROM OR LIMITATION
OF LIABILITY AS OWNER OF THE M/S BREMEN
UNTERWESER REEDEREI, GMBH,

Petitioner,

v.

ZAPATA OFF-SHORE COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS FOR
THE FIFTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

OPINION BELOW

The panel opinion of the court of appeals (Pet. App. A)[1] is reported at 428 F.2d 888 (CA 5, 1970). On rehearing en banc, the court adopted, per curiam, the majority holding and judgment of the panel (Pet. App. B), Slip Opinion of June 28, 1971. The Order of the district court (Pet. App. D) is reported at 296 F.Supp. 733 (M.D. Fla. 1969).

The heading of Appendix C to the Petition for a Writ of Certiorari indicates incorrectly that the district court's Memorandum and Order of July 29, 1968 was entered in

[1] "Pet. App." refers to the Appendices to the Petition for a Writ of Certiorari filed in this case.

Unterweser's limitation suit, No. 68-290. Actually this Memorandum and Order, from which no appeal was taken, was entered in Zapata's first filed suit, No. 68-21.

JURISDICTION

The jurisdictional requirements are adequately set forth in the Petition.

QUESTION PRESENTED

Zapata commenced suit against Unterweser in Tampa. Unterweser then commenced suit against Zapata in London. Next Unterweser filed a suit for exoneration from or limitation of liability in Tampa and obtained in that suit an injunction staying Zapata's first filed suit. Zapata filed claim and answer in the limitation suit. Unterweser counterclaimed. Zapata replied to the counterclaim. At this point Zapata moved the limitation court to enjoin Unterweser's prosecution of the London suit and Unterweser moved the limitation court to stay the limitation suit. The question is:

> WHETHER, IN THE CIRCUMSTANCES OF THIS PARTICULAR CASE, THE DISTRICT COURT ABUSED ITS JUDICIAL DISCRETION IN RULING THAT ALL OF THE CONTROVERSIES AT ISSUE BETWEEN UNTERWESER AND ZAPATA SHOULD BE TRIED IN UNTERWESER'S OWN TAMPA SUIT FOR EXONERATION FROM OR LIMITATION OF LIABILITY.[2]

STATEMENT

Zapata, a Houston based American corporation, engaged Unterweser, a Bremen based German corporation, to tow the American flag drill rig CHAPARRAL from the Missis-

[2] Unterweser does not seek certiorari to review the affirmance of the injunction against prosecution of the London suit. And Judge Wisdom, in his dissenting opinion to the panel decision, agrees that injunction was proper if jurisdiction were properly retained in Tampa. (Pet., App. A, A-43)

sippi River below New Orleans to the Mediterranean. On the tow from the mouth of the Mississippi to the Straits of Florida the CHAPARRAL on January 9, 1968 was heavily damaged by the loss of its three legs. Zapata told Unterweser to tow the wreck to Tampa, Florida, the nearest port of refuge.

On January 12, 1968, Zapata commenced suit against Unterweser *in personam* and the tug BREMEN *in rem* alleging negligent towage on the part of those in charge of the BREMEN.

When the flotilla arrived at Tampa, the U.S. Marshal arrested Unterweser's tug, the BREMEN, in Zapata's suit. Zapata deposed Unterweser's managing director, and the entire 23 man crew of the BREMEN in Tampa January 23-31, 1968.

On January 29, 1968 Unterweser, asserting the forum clause, moved for dismissal of Zapata's suit contending the district court lacked jurisdiction. Alternatively, Unterweser moved the court (1) to decline jurisdiction on forum non conveniens grounds, or (2) to stay the Tampa suit pending submission of the matter to the English courts. (The court denied these motions on July 29, 1968 and no appeal was taken.)

Meanwhile Unterweser commenced suit *for breach of contract* against Zapata in London on February 21, 1968.

Unterweser, *after notice filed in Zapata's suit,* deposed the CHAPARRAL's 8 man crew in Tampa February 22-25, 1968.

Further invoking the Tampa court's judicial processes, Unterweser moved for the production of 33 categories of documents on February 27, 1968. Zapata responded by producing 700 pages of documents for Unterweser's inspection.

On March 15, 1968, Unterweser noticed the depositions of 2 expert surveyors who had approved the seaworthiness of the CHAPARRAL for the tow. These depositions were taken in New Orleans April 9-12, 1968.

On July 2, 1968 *Unterweser filed a Complaint* in the U.S. District Court at Tampa seeking exoneration from or limitation of liability for events on the voyage upon which the CHAPARRAL was damaged.

On July 5, 1968 the district court, on Unterweser's motion, stayed the further prosecution of Zapata's first filed suit.

On July 8, 1968 Zapata filed its claim and answer in Unterweser's limitation suit, and on July 24, 1968 Zapata filed its Answer.

On August 28, 1968 Unterweser filed a Counterclaim against Zapata for everything sought in the London *breach of contract* suit, but *in addition* Unterweser alleged (1) in Count I a *maritime tort* (negligence) against Zapata for damages to the BREMEN's towing gear, and (2) in Count II a claim for a salvage award for services rendered by the BREMEN following the casualty.

On September 13, 1968 Zapata replied to Unterweser's Counterclaim. All issues between the parties were then joined.

On September 19, 1968 Zapata moved for an order enjoining Unterweser from prosecuting its London suit.

On October 2, 1968 Unterweser moved for an order staying the further prosecution of Zapata's claim in the limitation suit pending final determination of the London suit.

On January 21, 1969 the district court denied Unterweser's motion to stay and granted Zapata's motion for

injunction against Unterweser's prosecution of the London suit. This is the order from which Unterweser appealed.

In the London suit (1) Zapata has not joined issue, (2) Zapata has asserted no counterclaim, and (3) neither party has taken any testimony.

SUMMARY OF ARGUMENT

Certiorari should not be granted to review affirmance of a discretionary order in a limitation suit.

Having submitted itself and the dispute to the Tampa district court by filing suit for limitation of liability and counterclaiming against Zapata, and having had Zapata's first filed suit stayed by the limitation injunction, Unterweser should not be heard to complain that the district court refused to stay the limitation suit. Unterweser might have plead the limitation statutes as a defense had it not wanted the concourse, with its *ex parte* stay of all other proceedings.

Unterweser's London forum clause does not even purport to reach Zapata's *claim* in this Unterweser-commenced Tampa suit for limitation of liability.

It would have been unreasonable for the district court to enforce this forum clause on the facts in this case, so the case does not turn on the validity or invalidity, *per se*, of the forum clause.

Enforcement of the forum clause would have been unreasonable, because it would effectively deprive Zapata of a remedy it has in the American court for its negligence action against Unterweser — a remedy not allowed in the London court.

Enforcement of the forum clause would have been unreasonable because the balance of convenience is strongly in

favor of the Tampa court. The voyage preparations, the voyage, and the aftermath all occurred in the United States or nearby in the Gulf of Mexico. Forty witnesses live on the Gulf Coast or the lower Mississippi. The foreign crew members have been deposed. In all, 35 oral depositions have been taken. The Tampa suit is substantially ready for trial. Issue has not even been joined in London.

The asserted conflicts simply do not exist. *National Equipment Rentals Ltd.* v. *Szukhent* 375 U.S. 311 (1964) was a service of process case and *Wm. H. Muller & Co., Inc.* v. *Swedish American Line Ltd.*, 224 F.2d 806 (2d Cir. 1955) and *Central Contracting Co.* v. *Maryland Casualty Co.*, 367 F.2d 341 (3rd Cir. 1966) arise on facts so different that the cases should not even be compared.

The law is clear enough on the comity and public policy questions Unterweser poses. Unterweser simply does not agree with the conclusion the lower courts reached in applying that law to the facts of this case.

ARGUMENT

Introduction

Unterweser is seeking certiorari to review affirmance of a discretionary order entered by a district court in a limitation case Unterweser started. Unterweser, in what must be one of the most remarkable requests ever made to a limitation court, would have the district court decline to exercise the very jurisdiction Unterweser itself invoked, on the strength of a non-exclusive forum clause that does not even purport to prohibit Zapata from prosecuting a claim in this Unterweser-commenced limitation proceeding.

THE DECISION BELOW IS CORRECT

The District Court Properly Denied Unterweser's Motion to Stay Because the Forum Clause is Non-exclusive and in any Event Could not Bar Zapata From Prosecuting a Claim in the Limitation Suit Unterweser Commenced.

The forum clause reads:

> "Any dispute arising must be treated before the London Court of Justice."

The original proposed contract of towage, including the forum clause in question, was drafted by Unterweser, and the clause was not changed in the final draft (Taylor Affidavit, App. 63-64).[3] Unterweser's towage contracts ordinarily provide for "exclusive" German jurisdiction (von Aswegen Affidavit, App. 22). Unterweser easily might have included "exclusive" language in the forum provision but it did not. In these circumstances, in accordance with the familiar rule, courts will not stretch the language to cover the draftsman's omissions. The *Monrosa* v. *Carbon Black Export, Inc.*, 359 U.S. 180, 183 (1959).

This non-exclusive forum clause certainly did not preclude Zapata from prosecuting an *in rem* proceeding in the district court to enforce its maritime lien against the BREMEN for a maritime tort.[4]

But more importantly, the forum clause does not even purport to prohibit Zapata from prosecuting its claim for the CHAPARRAL's damages in Unterweser's *own* limitation action.

---

[3] "App." refers to printed appendix filed in the Fifth Circuit, which has been certified to this Court.

[4] Unterweser's forum clause does not in terms apply to *in rem* proceedings. This Court has held that a forum clause which does not in terms include *in rem* proceedings does not bar the filing of an *in rem* proceeding in another forum. *The Monrosa*, supra, 182-183.

It is settled law that parties, by the use of forum clauses, exclusive or non-exclusive, cannot oust an American court of its jurisdiction over parties properly brought before it.[5] The non-exclusive clause in this case should not be *stretched* to produce the inequitable result of prohibiting Zapata from prosecuting its claim in the American court whose jurisdiction Unterweser has invoked to obtain affirmative relief.

In brief, this particular forum clause is not applicable to Zapata's claim in Unterweser's limitation suit. Thus a decision on Unterweser's first question — whether forum clauses are *per se* invalid because contrary to U.S. public policy — is not necessary to the decision of this case.

The District Court Properly Denied Unterweser's Motion to Stay Because Unterweser had Submitted Itself and the Entire Controversy to the District Court's Jurisdiction by Filing the Limitation Suit, Procuring the Issuance of a Limitation Injunction, and Counterclaiming against Zapata

Unterweser is seeking certiorari to review affirmance of a discretionary order entered by the district court in a limitation suit Unterweser started.

After fully litigating with Zapata in the latter's first filed suit, after noticing and taking 10 depositions, after a total of 35 depositions (2170 pages) were taken by both parties, and after 700 pages of documents were produced by Zapata on *Unterweser's motion for discovery,* Unterweser filed this suit in the same court affirmatively seeking exoneration

---

[5] 6A Corbin on Contracts, § 1445 (1962); Anno., 56 A.L.R. 2d 300 (1957).

from or limitation of liability.[6] Unterweser alleged that it "... desires to contest its liability and the liability of M/S BREMEN for the injuries, losses and damages ... incurred upon said voyage, *and particularly any losses and damages incurred by the owners [Zapata] of the drill rig CHAPARRAL ...*" (App. 88) (emphasis added)

Unterweser further asserted in its ad interim stipulation that "... the Plaintiff [Unterweser] wishes to prevent the prosecution of all proceedings against Plaintiff, or M/S BREMEN ... in any and all courts ... arising out of the matters ... recited in said Complaint ... *except in the present proceedings ...*" (App. 95) (emphasis added)

Unterweser obtained the usual limitation injunction, stopping the full blown litigation in Zapata's first filed suit. Besides asking the court for exoneration from or limitation of liability, Unterweser *counterclaimed against Zapata,* for the *same breach of contract damages* sought in its London suit, but *in addition* alleged (1) a maritime *tort* (negligence) for damages to the BREMEN's towing gear, and (2) a claim for a *salvage* award for services rendered by the BREMEN to the wrecked CHAPARRAL.

---

[6] Unterweser could have obtained the *protection* of the limitation statutes by raising limitation as a defense to Zapata's suit. *Deep Sea Tankers* v. *The Long Branch,* 258 F.2d 757 (2d Cir. 1958), cert. den. 358 U.S. 933 (1958); *The Chickie,* 141 F.2d 80 (3rd Cir. 1944). But by commencing the limitation suit Unterweser could, by use of the limitation injunction, block prosecution of all suits against it except in the limitation forum. Striving to avoid the effect of its own waiver of the forum clause, Unterweser says it was forced to file for limitation because the district court had not ruled on the motions which Unterweser had filed. This argument does not stand up to analysis. No ruling the district court made would have tolled the running of the statutory six months period. There is no way the effect of the forum clause could have been finally decided in the appellate court within six months.

Obviously Unterweser wanted a concourse to try all claims against it, because, as alleged in its Complaint, it "fears the filing of additional claims." (App. 85). There were potential CHAPARRAL crewmember claims for personal injuries in addition to Zapata's property damage claim.

With its limitation complaint and counterclaim both at issue, and Zapata's first filed suit stayed, Unterweser asked the district court to stay *this* suit until it could litigate the subject in London, relying on a non-exclusive forum clause in the towage contract.

The effect of the forum clause must be considered in the context of the limitation court's equity powers. For illustrations of the limitation court's authority to compel a reluctant limitation plaintiff to do equity, see *The Salvore*, 36 F.2d 712 (2d Cir. 1929)[7] and *A. C. Dodge, Inc.*, v. *J. M. Carras, Inc.*, 218 F.2d 911 (2d Cir. 1955).[8]

The district court, relying upon *The Salvore*, *Dodge* v. *Carras* and this Court's landmark decision in *Hartford Accident & Indemnity Co.* v. *Southern Pac. Co.*, 273 U.S. 207 (1927),[9] held:

> "... It seems clear that one, when seeking to take advantage of the limitation statutes ... should be required to do 'equity' by refraining from litigating the same controversy in other courts ... Unterweser should recognize that this Court has jurisdiction to determine the entire controversy. *In aid of this jurisdiction, it may be, and it is, in this case, necessary to require that duplicity of litigation be terminated.*" (Pet., App. D, D-5) (emphasis added)

---

[7] 2d Circuit ordered district court to dissolve limitation injunction unless limitation-seeking shipowner agreed to *stay* trial of Italian suit which might involve same issues.

[8] 2d Circuit affirmed district court's use of equitable powers in limitation case to compel limitation plaintiff to obtain *stay* of its suit in another forum to avoid dissolution of limitation injunction.

[9] This Court held a limitation proceeding facilitates a settlement of the whole controversy and that it is "an equitable suit to the extent that the admiralty court, *having the broadest of powers to do exact justice between the parties*, may take such action in the case as justice demands ..."

This Court reaffirmed its *Hartford* holding in deciding *British Transportation Commission* v. *United States*, 230 F.2d 139 (4th Cir. 1956), affirmed 354 U.S. 129 (1957).

Having *started* the limitation suit in Tampa, having had Zapata *enjoined* from prosecuting its claim outside the limitation suit, and having *counterclaimed* against Zapata in the limitation suit, Unterweser cannot justifiably argue, nor has it shown, that the district court abused its discretion in keeping the entire controversy in Tampa *where Unterweser itself had put it.*

It is not necessary for this Court to determine the *per se* validity of the forum clause under these circumstances.

The District Court Properly Denied Unterweser's Motion to Stay Because the Record Shows it Would be Unreasonable to Enforce the Forum Clause. The Practical Result of Enforcement Would Be to Deprive Zapata of a Remedy It Possesses in the American Court Under American Law.

Unterweser argues the forum clause should be enforced unless enforcement is unreasonable. Where the practical effect of enforcement might deprive the party resisting the forum clause of all remedy,[10] or would substantially affect

---

[10] *Chemical Carriers, Inc.* v. *L. Smit & Co.'s Internationale Sleepdienst,* 154 F.Supp. 886 (S.D.N.Y. 1957). Dutch tug (Smit), on voyage tow (Chemical Carriers vessel), salvaged German ship. Under American law Chemical Carriers was entitled to participate in salvage award, but not so under Netherlands law. Court refused to enforce exclusive forum clause (Rotterdam) because to do so would be unreasonable, holding (888): "... in view of ... Netherlands law, the practical result of compelling libelant to litigate in Rotterdam courts might well be to deprive it of all remedy". The court, recognizing the reasonableness test of *Muller* was applicable, distinguished same, pointing out "... there was no showing [in *Muller*] ... that the libelant would be without effective remedy in the foreign forum."

its substantive rights,[11] or would put one of the parties to an unreasonable disadvantage,[12] or would subject an American citizen sent abroad to a different measure of damages or a more restrictive limitation proceeding,[13] the courts agree enforcement would be unreasonable.

The practical effect of enforcing this forum clause would be to affect substantially Zapata's substantive rights. The clauses in the towage contract exonerating Unterweser from liability for its negligence and casting all loss resulting from damage to the CHAPARRAL on Zapata[14] are valid and enforceable under the laws of England,[15] but invalid and unenforceable under the maritime law of the United States.[16] In the Tampa forum the rights and liabilities of Zapata and Unterweser are to be measured by the United States maritime law, even though the casualty occurred in international waters.[17] In any event, and con-

---

[11] *General Motors Overseas Operations* v. *S. S. Goettingen*, et al., 225 F.Supp. 902 (S.D.N.Y. 1964). The court, applying *Muller* test of reasonableness, declined to enforce forum clause on ground that to remit plaintiffs to German courts would *substantially affect their rights*. The interpretation of "peril of the sea" under German law was such that a storm, not severe enough to free a carrier from liability under American law, might be sufficient under German law to free the carrier from liability. The court distinguished *Muller* saying (906): "...the Court [Muller] clearly pointed out that the foreign law would be 'no more restrictive' than United States law on the shipper's rights."

[12] *Central Contracting Co.* v. *Maryland Casualty Co.*, 367 F.2d 341 (3d Cir. 1966), 345.

[13] *Wm. H. Muller & Co., Inc.* v. *Swedish American Line Ltd.*, 224 F.2d 806 (2d Cir. 1955), 808.

[14] "1. ... URAG, their masters and crews are not responsible for defaults and/or errors in the navigation of the tow.

"2(b) Damages suffered by the towed object are in any case for the account of its Owners." (App. 26)

[15] Uncontradicted opinion of English maritime law expert Bateson. (App. 65-71)

[16] *Dixilyn Drilling Corp.* v. *Crescent Towing & Salvage Co.*, 372 U.S. 697 (1963) [following *Bisso* v. *Inland Waterways Corp.*, 349 U.S. 85 (1955)], and invalidating *freely negotiated* exculpatory clause in consideration of which tow hire was reduced.

[17] Forum law determines high seas *tort* liability where one vessel owner is American and the other is foreign. *The Scotland*, 105

tract language notwithstanding, American courts will *not* enforce provisions exonerating shipowner from its negligence though valid under foreign law *but void under American law,* because to do so would violate the public policy of the United States.[18]

If Unterweser demonstrates a right to limit liability in England, the limitation fund will be 33,600 pounds sterling ($80,136).[19] In the United States the limitation fund is at least $1,300,000 (Unterweser's ad interim stipulation). This is important because Zapata's *uninsured* losses exceed $3,000,000.[20]

Although Unterweser alleges in its complaint that its right to a limitation of liabiliy is governed by the English law, the amount of Unterweser's liability in this American proceeding (i.e., the limitation fund) is governed by the law of the forum and the United States limitation of liability statutes.[21]

The English limitation fund ($80,136) would be about 6% of the American fund ($1,300,000). To relegate Zapata to the English court would substantially affect its remedy.

U.S. 24 (1881); *The Belgenland,* 114 U.S. 355 (1885), 369; *The Gylfe and The Trujillo,* 209 F.2d 386 (2d Cir. 1954), 387.

Suit by tow owner against tug owner for damages caused by negligent towing is *ex delicto* not *ex contractu. Stevens* v. *The White City,* 285 U.S. 195 (1932).

[18] *The Kensington,* 183 U.S. 263 (1902), 269-270; *Oceanic Steam Nav. Co.* v. *Corcoran,* 9 F.2d 724 (2d Cir. 1925).

[19] Complaint for limitation (33,600 pounds sterling). (App. 91); Opinion of English maritime law expert. (Appendix B-4 of Zapata's Supplemental Brief in Fifth Circuit — certified to this Court).

[20] Affidavit of Zapata's executive vice president. (Supplemental Appendix A-2 of Zapata's Supplemental Brief on Rehearing in Fifth Circuit — certified to this Court).

[21] *The Titanic,* 233 U.S. 718 (1914); *The Western Farmer,* 210 F.2d 754 (2d Cir. 1954).

The District Court Properly Denied Unterweser's Motion to Stay Because the Balance of Convenience is Strongly in Favor of Trying This Controversy in the American Court. To Enforce the Forum Clause Would be Unreasonable.

The courts, in testing the reasonableness of a forum clause for determination of its enforceability, consider the conveniences of the parties.[22]

Zapata has shown, without dispute, that there are over 40 witnesses resident in the United States (principally in Florida, Louisiana and Texas), there are no fact witnesses in England, and the depositions of Unterweser's managing director and of every one of the members of Unterweser's tug and riding crews have been taken. Everything that happened in preparing for the tow, on the tow, and in returning the CHAPARRAL to the Mississippi for repairs happened within 400 miles of Tampa.

Zapata's attorneys have devoted an enormous amount of time in investigating the casualty involved in this suit, interviewing numerous lay witnesses, engaging and consult-

---

[22] An illustrative case is *Hawaii Credit Card Corp.* v. *Continental Credit Card Corp.*, 290 F.Supp. 848 (D.C. Hawaii 1968). Plaintiff filed suit for breach of franchise agreement. Defendant filed motion to dismiss on ground of exclusive forum clause (California courts). Court denied motion, holding (851-852):

> "This court, as did . . . the Second Circuit in Wm. H. Muller & Co. v. Swedish American Line Ltd., . . . holds that the enforceability of such a venue agreement as is involved here depends upon its reasonableness. Under the setting of this particular case where apparently the target of defendants' agreements and actions was the credit card business of Hawaii, *where many witnesses are residents of Hawaii and most evidence as to the acts complained of apparently is to be found in Hawaii,* this court comes to the conclusion *that the jurisdictional agreement was unreasonable and adherence of the parties to that agreement should not here be given effect.*" (emphasis added)

ing with experts, preparing pleadings, motions, the taking of 35 oral depositions, researching the law, and preparing and filing briefs. Prior to Unterweser's appeal to the Fifth Circuit, Zapata's attorneys collectively have spent over 100 days in connection with the foregoing. In addition, Zapata has spent over $15,000 (not counting attorneys' fees) for deposition costs, interpreters' fees, witnesses' expenses, photostating of documents, investigation expenses, and travel and lodging costs. (App. 155)

The district court, after considering Unterweser's motion to decline jurisdiction of Zapata's *first* filed suit on grounds of forum non conveniens, found ". . . The balance of conveniences here is not strongly in favor of defendant [Unterweser] and Plaintiff's [Zapata's] choice of forum should not be disturbed.[23] The same court, in denying Unterweser's motion to stay the limitation case and enjoining Unterweser from prosecuting the London suit, said: "The balance of convenience is *strongly* in favor of litigation in this forum [Tampa] *initially* and to allow the same action to be prosecuted simultaneously elsewhere [London] would cause inequitable hardship."[24]

This finding that the "balance of convenience is *strongly* in favor of litigation in this forum" is supported by substantial and undisputed evidence.[25] Appendix A, infra, contains a Summary of the Balance of Convenience.

---

[23] Pet., App. C, C-4. Unterweser's criticism (Pet. 17) of this finding of the district court, on *Unterweser's motion to decline jurisdiction on forum non conveniens,* is not justified. Since Unterweser's motion asked the court to decline jurisdiction on forum non conveniens grounds, the district court quite properly considered *forum non conveniens* law. *Gulf Oil Corp.* v. *Gilbert,* 330 U.S. 501 (1947).

[24] Pet., App. D, D-6.

[25] In opposing Unterweser's motion to stay, Zapata filed affidavits which set forth in detail the convenience factors which the district court considered in ruling on Unterweser's motion to stay.

Zapata would be seriously inconvenienced if relegated to the English court. To give effect to the forum clause would be unreasonable. At the very least, the convenience factors show the court did not abuse its discretion in denying Unterweser's motion to stay, and in determining that all the controversies should be tried in Unterweser's limitation action.

An American citizen, under the circumstances of this case, should not be denied access to its own courts.

THERE IS NO CONFLICT OF DECISIONS

National Equipment Rentals Ltd. v. *Szukhent*, 375 U.S. 311 (1964).

As its first reason for granting the writ, Unterweser says the decision of the court of appeals *irreconcilably* conflicts with this Court's decision in *National Equipment Rentals* v. *Szukhent*, in which Mr. Justice Stewart noted:

> "The only question now before us is whether the person upon whom the summons and complaint were served was 'an agent authorized by appointment' to receive the same . . ."[26]

and went on to hold: ". . . we have concluded that Florence Weinberg was 'an agent authorized by appointment . . . to receive service of process,' and accordingly we reverse the judgment before us."[27] In discussing the decision Justice Stewart said: ". . . *it is settled . . . that parties to a contract may agree in advance to submit to the jurisdiction of a given court. . . .*" But not even the principle mentioned in that decision is involved, much less disputed, by the parties, or denied by the court of appeals in this case. And there is not the hint of a question as to the authority of the person served with process in Unterweser's case to "receive the same". Even Judge Wisdom, dissenting from the panel decision of the court of appeals, recognized the

---

[26] 375 U. S. at 313

[27] ibid. 314

irrelevance of *Szukhent* with which Unterweser would create a certiorari-commanding conflict when he said:

> "*Szukhent* is not significant authority, however, because the Court was faced with the question whether New York courts had jurisdiction, *not whether other courts should decline jurisdiction.*"[28] (emphasis added)

Zapata submits that a cursory consideration of *Szukhent* is sufficient to show that the supposed conflict does not exist.

The Unterweser-asserted conflicts with decisions of the Second and Third circuits are equally illusory.

Wm. H. Muller & Co., Inc. v. *Swedish American Line Ltd.*, 224 F.2d 806 (1954).

Where there were (1) a Swedish shipowner (who had *not* started a limitation suit in the U. S.), (2) Swedish crewmembers all residing in Sweden, (3) most of the evidence available in the Swedish court, (4) an *exclusive* Swedish forum clause, (5) no American fact witnesses, (6) *undisputed showings that the Swedish court would apply the same measure of damages as American maritime courts, and (7) that limitation proceedings under Swedish law were no more restrictive than under American law,* the Second Circuit held the forum clause was not unreasonable and would be enforced.

Can it be seriously contended that a decision affirming a discretionary order in an American limitation proceeding *started* by a German tugowner who wants the case sent to England where there are no witnesses and the law would deprive the American owner of the damaged tow of a negligence remedy on the strength of a non-exclusive forum clause — is in conflict with *Muller*?

---

[28] Dissent from panel decision (Pet. App. A, A-27).

Zapata suggests that when the facts are so different — opposite on every vital point — it borders on the frivolous to assert a conflict, particularly when the Fifth Circuit decision which is supposed to conflict with *Muller* says: "But apart from the forum selection clause itself, the circumstances supported a retention and determination by the district court," and goes on to discuss all of the facts presented by this case showing that enforcement of this forum clause would be unreasonable.[29]

Central Contracting Co. v. *Maryland Casualty Co.*, 267 F.2d 341 (1966).

In *Central Contracting* v. *Maryland Casualty*, the Third Circuit had under consideration a suit by a subcontractor (Central) on a Pittsburgh public housing project against the general contractors' surety (Maryland). This was not, of course, a case in which Maryland Casualty had commenced a suit in Pittsburgh in such a way as to subject itself to the full equitable powers of the Pittsburgh court. The subcontract provided for exclusive jurisdiction in New York, the state of incorporation of two of the three general contractors. Enforcement was thought reasonable since the New York forum was only 400 miles from plaintiff's home office, and such affidavits as were filed did not "rise to the dignity of substantial evidence of unreasonableness." While holding *this* clause reasonable on *these* facts the Third Circuit pointed out that such a forum clause does not "oust the jurisdiction of the courts", and that either party will always have the "opportunity to present whatever evidence will move a court *in the particular circumstances not to decline to exercise its undoubted jurisdiction*". The Third Circuit said a forum clause should be enforced ". . . so long as there is no proof *that its provisions will*

[29] Pet., App. A, A-12, 13, 14.

put one of the parties to an unreasonable disadvantage . . ." (emphasis added).

The Tampa district court and the Fifth Circuit had proof that enforcement of Unterweser's forum clause would be unreasonable because it would deprive Zapata of a remedy for negligence, shrink the limitation fund by 94%, and shift the scene of the trial 4000 miles from the area where the operative facts occurred and dozens of witnesses live. Indeed, the Fifth Circuit adverted to these very factors in holding that ". . . the circumstances supported a retention and determination by the district court."[28]

Unterweser suggests that the decision in the courts below turned on mis-placement of the burden of proof.[29] The truth is that there was no proof submitted by Unterweser to counter Zapata's evidence of deprivation of remedy and extraordinary inconvenience. *Whoever* legally had the burden of going on with *proof* of reasonableness or unreasonableness, *Zapata shouldered the burden* and showed without contradiction that enforcement would be unreasonable.

Unterweser contends the Fifth Circuit erred "in determining that reasonableness of the forum provision can be determined solely by consideration of forum non conveniens". (Pet., 3, 17). This is an incorrect interpretation of the court of appeals' decision. In addition to consideration of the available evidence in the American forum, including 35 depositions already taken in the American litigation (Pet., App. A, A-12, A-13), the Fifth Circuit held: "The district court was entitled to consider that remanding Zapata to a foreign forum, with no practical contact

---

[28] Pet., App. A, A-12, 13, 14.

[29] Pet., 3, 17, 18, 22. Petitioner also says (Pet., 3) that the Fifth Circuit committed "fundamental error" in holding the Petitioner had the burden of showing the reasonableness of the stipulated forum.

with the controversy, could raise a bar to recovery by a United States citizen which its own courts would not countenance." Zapata's proof of deprivation of its remedy (for negligent towage) in the foreign forum has not been questioned by Unterweser.

To justify conflict certiorari, the conflict should be well defined. The rulings in conflict should be so far on the same state of facts that the decisions can truly be said to be on the same question.

Neither the *Szukhent, Muller* nor *Central Contracting* courts had the same question the Tampa district court had in this case. *Muller* was the closest, but its facts were diametrically *opposite* on every important factor.

There simply is no conflict.

NO QUESTIONS OF IMPORTANCE ARE INVOLVED

Apparently recognizing that the alleged conflict with *Szukhent, Muller* and *Central Contracting* will not withstand scrutiny, Unterweser suggests, in Reason 2 for granting a writ, that this is a case of far-reaching international consequence which this Court should use as a vehicle to harmonize or unify international maritime law. (Pet., 18-22)

Not so. This case is important to the parties because, by private standards, a lot of money is involved. But it arises in a fact context so unusual that its utility in determining the broad questions Unterweser suggests would necessarily be limited. This Court is presented with a situation complicated by forum non conveniens factors, and the fact that the party seeking enforcement of the forum clause has itself sought the jurisdiction of the court it now seeks to leave. And all of this comes up on the court of appeals' affirmance of the way in which the district court exercised

its undisputed discretion in a case of a class which has produced only 5 other cases on the court of appeals level in the last 16 years.[30]

Not even Unterweser suggests an unreasonable enforcement of a forum clause. The unreasonableness of enforcement of the London forum clause has been demonstrated to the satisfaction of the district court and the court of appeals. Even under the test Unterweser urges, Unterweser loses.

The underlying law is clear enough:

1. A limitation judge has the power and discretion of an equity chancellor to see that justice is done. He has the power to require the limitation plaintiff to try the whole controversy in his court and to enjoin the limitation plaintiff from litigating elsewhere. The exercise of his discretion to retain jurisdiction is not subject to challenge in absence of a showing of abuse.

2. United States courts will not enforce covenants pre-exonerating a tugowner from the consequences of his negligence.

3. United States courts will not send its citizens to foreign courts where they will be deprived of rights they would have in this country.

---

[30] The other cases are: *Wm. H. Muller & Co., Inc.* v. *Swedish American Line Ltd.*, 224 F.2d 806 (2nd Cir. 1955) (bill of lading case); *Carbon Black Export, Inc.*, v. *The S.S. Monrose*, 254 F.2d 297 (5th Cir. 1958) (bill of lading case); *Anastasiadis* v. *S.S. Little John*, 346 F.2d 281 (5th Cir. 1965), cert. den. 384 U.S. 920 (1966) (alien seaman's personal injury case); *Central Contracting Co.* v. *Maryland Casualty Co.*, 367 F.2d 341 (3rd Cir. 1966) (domestic surety bond case); and *Indussa Corp.* v. *S.S. Ranborg*, 377 F.2d 200 (2d Cir. 1967) (bill of lading case), overruling *Wm. H. Muller & Co., Inc.*, supra.

4. United States courts will not enforce a forum clause if the balance of convenience is strongly in favor of the American forum.

5. United States courts apply its maritime law to high seas torts, and in any event do not enforce exculpatory provisions void under its own maritime law, though valid under foreign laws, where the contract is performed at least in part in the United States.

Unterweser says this Court should clarify the "degree of comity owed foreign courts" and the extent to which "United States courts impose its so-called 'public policy' upon international commercial transactions". (Pet. 21-22) This Court has expressed itself on these questions in unambiguous terms, where, *in a case like this, the contract was to be performed in part in the United States.*[31] In *The Kensington,* 183 U.S. 263, the ship owner sought to enforce provisions exonerating it from liability for its own negligence. Such provisions were valid under Belgian law for which the contract stipulated. This Court *refused* enforcement on grounds of public policy, holding neither *comity* nor the will of the parties can set at naught the public

[31] The towage contract called for performance in the United States. Extensive preparations for the voyage were made on the CHAPARRAL, jacked up near Venice, La., on the Mississippi. There plans for the voyage were made by Unterweser's and Zapata's representatives. Unterweser's Port Captain (from Germany) and the BREMEN's Master inspected the CHAPARRAL and made towing gear arrangements. Contract called for Zapata to furnish Unterweser pre-departure seaworthy certificate for CHAPARRAL, Marine Surveyor was employed by Zapata to inspect CHAPARRAL. This was done, and certificate delivered to Unterweser's Port Captain. Contract called for Zapata to engage and pay for pilots required to navigate CHAPARRAL and BREMEN from Venice, La., to the Gulf of Mexico — which it did. Contract called for tug hire to be paid Unterweser at New York bank. (App. 153-154).

policy of the United States. As the Court summed it up (at 269):

> "The contention amounts to this: where a contract is made in a foreign country, *to be executed at least in part in the United States*, the law of the foreign country, either by its own force or in virtue of the agreement of the contracting parties, must be enforced by the courts of the United States, even although to do so requires the violation of the public policy of the United States. To state the proposition is, we think, to answer it. It is true, as a general rule, that the *lex loci* governs, and it is also true that the intention of the parties to a contract will be sought out and enforced. But both these elementary principles are subordinate to and qualified by the doctrine *that neither by comity nor by the will of the contracting parties can the public policy of a country be set at naught.*" (emphasis added)[32]

No question of comity is involved here.

"Reason 2" is an attempt by Unterweser to surround a negligent towage case with an aura of international importance on a high policy level. Unterweser requests this Court to enunciate principles of law in areas in which the law is clear — in its efforts to resolve an issue (retention of jurisdiction) that turns on the particular facts of the case. Here the *facts* fully justified the exercise of the district court's lawful discretion in its decision that the whole controversy should be tried in Unterweser's own limitation proceeding.

"Reason 2", analyzed, is no reason for granting the writ.

---

[32] In accord: *Oceanic Steam Nav. Co.* v. *Corcoran*, 9 F.2d 724 (2nd Cir. 1925), relying on *The Kensington*, supra.

CONCLUSION

For the foregoing reasons, this Court should deny the Petition for Writ of Certiorari.

Respectfully submitted,

JAMES K. NANCE
and
DEWEY R. VILLAREAL, JR.
Attorneys for Respondent

OF COUNSEL:

BAKER & BOTTS
3000 One Shell Plaza
Houston, Texas 77002

and

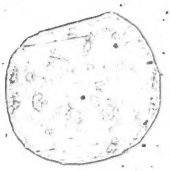
FOWLER, WHITE, GILLEN,
HUMKEY, KINNEY &
BOGGS, P.A.
P. O. Box 1438
Tampa, Florida 33601

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that copies of this Opposition Brief have been furnished by airmail postage prepaid to David C. Kerr and Jack C. Rinard of Macfarlane, Ferguson, Allison & Kelly, 512 Florida Avenue, P. O. Box 1531, Tampa, Florida 33601 and to Warren M. Faris and J. Y. Gilmore, Jr., of Faris, Ellis, Cutrone, Gilmore and Lautenschlaeger, 1207 Whitney Building, New Orleans, Louisiana 70130, Attorneys for Petitioner, this 25th day of September, 1971.

Dewey R. Villareal Jr.

DEWEY R. VILLAREAL, JR.,
Attorney for Respondent



APPENDIX A

SUMMARY OF

BALANCE OF CONVENIENCES

SUMMARY OF BALANCE OF CONVENIENCES

Listed below are the convenience factors that were before the district court when it passed on Unterweser's motion to stay filed in the limitation action.

The reasonable conclusion to be reached from a consideration of these factors is that Zapata would be very seriously inconvenienced if it were relegated to the English court. At the very least these factors show that the district court did not abuse its discretion in denying Underweser's motion to stay and in deciding to try this dispute in the American court.

Factors Supporting Trial in the United States

The following factors (all shown in Zapata's undisputed affidavits) will make trial in the United States substantially more convenient (App. 50-57; 144-157):*

Zapata's Witnesses

1. There were seven employees of Zapata and one employee of a catering company on board the CHAPARRAL during the voyage. They are American citizens whose permanent addresses are in the Gulf Coast area of the United States. They are Oscar Willard, Wilton Johnson, Oscar W. Paul, Kenneth Price, Billy C. Burke, Earl B. Richie, Nolan B. Gamble and L. J. Fruge (catering company employee), all of whose depositions have been taken in Zapata's first filed suit. These depositions were noticed and taken by both Unterweser and Zapata.

---

*"App." refers to printed appendix filed in the Fifth Circuit, which has been certified to this Court.

2. The following employees of Zapata:

(a) Hoyt Taylor, Vice President and Chief Engineer;

(b) L. V. Whittington, Manager of Operations;

(c) Wiley C. Fenner, Senior Drilling Superintendent; and

(d) James Booth, Engineer.

These four persons reside in Houston, Texas. Their testimony is material on the plans and preparations for the voyage in question and on the question of the seaworthiness of the CHAPARRAL.

3. Noel Thompson, resident surveyor for Salvage Association, London, who resides in New Orleans, Louisiana, and Captain John H. Hellendoorn, staff marine surveyor for Salvage Associtaion, London, who resides in New Jersey.

These two men participated in the pre-voyage survey of the CHAPARRAL. Their testimony is material on the plans and preparations for the voyage in question and on the question of the seaworthiness of the CHAPARRAL. Their depositions were noticed and taken by both Unterweser and Zapata.

4. A representative of Breit Engineering Company of New Orleans, Louisiana, a naval architectural firm, who has knowledge of the stability of the CHAPARRAL.

5. Joseph Tynan, Marine surveyor, resident of New Orleans, Louisiana, who made a post-casualty damage survey of the CHAPARRAL at the request of Zapata.

6. Sam Bryan of Shilstone Testing Laboratories, metallurgist residing in Houston, Texas, who has participated in certain metallurgical testings of the damaged portions of the three legs of the CHAPARRAL.

7. Zapata expects to call several representatives of R. G. LeTourneau, Inc., which built the CHAPARRAL and delivered it to Zapata in the Spring of 1966, to testify concerning the construction of the CHAPARRAL. They are Gulf Coast residents.

8. Zapata expects to call certain workmen of R. G. LeTourneau, Inc., who carried out work on the CHAPARRAL in preparation for the voyage in question, to testify concerning such work and the seaworthiness of the rig. They are Gulf Coast residents.

9. Several representatives of R. G. LeTourneau, Inc., who will testify as to the damage repairs, the necessity therefor, and the reasonableness thereof, which were performed by R. G. LeTourneau, Inc. at its facility in Vicksburg, Mississippi, and other places on the Mississippi River. The three self-elevating legs of the CHAPARRAL were lost in the subject casualty of January 9, 1968, and LeTourneau was engaged by Zapata to manufacture, assemble, and install replacements for these legs. These witnesses are Gulf Coast residents.

10. A. Holm-Andersen, marine surveyor and tug valuation expert residing in New Jersey, will be called as a witness for Zapata as to the value of the M/S BREMEN, and Jack Mowbray, tug valuation expert of New York City, will also be called as a witness for Zapata as to the value of the M/S BREMEN.

11. Zapata employed a Tampa photographer to take pictures of the damaged condition of the CHAPARRAL. He will be called as a witness.

12. Other witnesses whose testimony is only available in the United States pertaining to the damages sustained by Zapata are representatives of:

a. Davis Transport, Inc., of Houston, Texas.

b. Bailey B. Line, Inc., of Metairie, Louisiana.

c. Construction Services, Inc., of Houma, Louisiana.

d. General Welding Supply Company of Tampa, Florida.

e. Pemco Welding, Inc., of Belle Chasse, Louisiana.

f. Specific Offshore Equipment Company of Houston, Texas.

g. Gulf Mississippi Marine Corporation of New Orleans, Louisiana.

h. Crescent River Pilots Assn. of New Orleans, Louisiana.

i. Associated Branch Pilots of New Orleans.

j. Statton & Statton Co., Inc., of Morgan City, Louisiana.

k. Misener Marine Constructions, Inc., of St. Petersburg, Florida.

l. Hendry Corporation of Tampa, Florida.

m. Pass-a-Grille Marina Inc., of St. Petersburg Beach, Florida.

n. J. W. Appley & Son., Inc., of St. Petersburg, Florida.

o. Wilson M. Hubbard Enterprises, of Pass-a-Grille Beach, Florida.

These persons and companies have furnished various services, equipment, and supplies in connection with repair of the damages sustained by Zapata. These witnesses will be called by Zapata to establish its damages.

UNTERWESER'S AMERICAN WITNESSES

The following American residents were engaged by Unterweser, following the casualty, and they may reasonably be expected to be called as witnesses by Unterweser in the American proceeding:

1. Rush Johnson and J. R. Bencal, two marine surveyors, engaged by Unterweser to survey the post-casualty damages to the CHAPARRAL. They reside in Houston, Texas.

2. Representatives of Pittsburgh Testing Laboratories at Tampa, Florida, and Pittsburgh, Pa., engaged by Unterweser to perform certain metallurgical tests on parts of the damaged legs of the CHAPARRAL. These testing experts reside in Flordia and Pennsylvania.

3. Unterweser employed a photographer to take photographs of the damaged condition of the CHAPARRAL. He resides in Tampa, Florida.

4. Unterweser engaged Thomas A. Addison, surveyor, to survey the damaged towing gear of the M/S BREMEN. He resides in Tampa, Florida.

5. Harry W. Reineke, marine surveyor and naval architect in the City of New Orleans, Louisiana. He was employed by Unterweser's representatives to examine the M/S BREMEN for valuation purposes. His affidavit as to value appears as Exhibit "A" to Unterweser's limitation complaint in Case No. 68-290 Civ.-T.

To be put on the scale in determining the "balance of convenience" are the inconveniences Unterweser would encounter in the American court. In this connection it is instructive to consider what Unterweser has asserted:

1. In Unterweser's combined motions to dismiss for lack of jurisdiction, to decline jurisdiction, or to stay, which were filed in Zapata's first filed suit, it is stated: "That in the alternative, in light of matters set forth in the affidavit of Eric von Aswegen, annexed hereto as "Exhibit A", the court should decline to assume jurisdiction over the within cause on the ground of *forum non conveniens.*" (App. 20) In Mr. von Aswegen's affidavit, it is stated that the M/S BREMEN was constructed in West Germany and is of German registry; that the officers and crew of the M/S BREMEN are of German nationality; that Unterweser is a German corporation; and that the Tampa District Court "constitutes an unaccessible and inconvenient forum insofar as Unterweser Reederei GMBH is concerned." His affidavit further states: "that the location of the foreign forum selected by the parties under and pursuant to the aforementioned towage contract, copy of which is attached hereto as Affiant's Exhibit No. 1, namely, London, England, constitutes the *'balance of convenience'* insofar as the relative positions of the parties are concerned." (App. 22-23). There were no other affidavits filed by Unterweser in that proceeding.

2. In Unterweser's motion to stay filed its limitation action, and the only one involved in this appeal, there is no mention of the United States District Court at Tampa as an *inconvenient* forum. *Its motion to stay is bottomed on the London forum clause, and no affidavits were filed in support of that motion.* (App. 205). (emphasis added)

The dissenting opinion to the panel decision of the Fifth Circuit (Pet. App. A, A-42 mentions ". . . most of Unterweser's witnesses reside in Germany — the twenty-three

crew members of the BREMEN, Von Aswegen, Managing Director of Unterweser, *personnel from the builders of the Bremen and the independent contractors who outfitted the vessel, individuals with companies for whom Bremen has previously towed.*" There is nothing whatsoever in the record to indicate Unterweser has any plan to call any of the persons mentioned in the italicized quotation as witnesses. *In any event, Zapata has stipulated that the BREMEN was properly designed, properly constructed, and properly outfitted, and Unterweser need not produce witnesses in Tampa to prove these facts.***

In considering the inconveniences to Unterweser the question of evidence of Unterweser's crew must of course be considered. In this connection it should be remembered that the testimony of the German crew of the BREMEN, the German riding crew of the CHAPARRAL, and Managing Director von Aswegen has been taken by deposition and preserved for the trial of the case in the American court. The oral depositions of these twenty-eight men have been taken in accordance with traditional admiralty practice, because, as is common knowledge, crew members are hard to produce in person at most trials.

ZAPATA'S INCONVENIENCES

Also to be put on the scale in determining the "balance of convenience" are the inconveniences of Zapata if the case is tried in the London court:

1. The attorneys for Zapata in the American court, Dewey R. Villareal, Jr., of Tampa, Florida, and James K. Nance of Houston, Texas, have devoted an enormous amount of time in investigating the casualty in-

**See p. 39, Supplemental Brief of Zapata's filed in Fifth Circuit, which has been certified to this Court.

volved in this suit, interviewing numerous lay witnesses, engaging and consulting with experts, preparing pleadings, motions, the taking of 35 oral depositions, researching the law and preparing and filing briefs. Prior to this appeal, Messrs. Villareal and Nance, attorneys for Zapata, collectively spent over 100 days in connection with the foregoing. In addition, Zapata has spent over $15,000 (not counting attorneys' fees) for deposition costs, interpreters' fees, witnesses' expenses, photostating of documents, investigation expenses, and travel and lodging costs. In preparation for the trial in the American court, 35 depositions, consisting of some 2170 pages of testimony, have been taken. More than 700 documents have been marked as exhibits in the course of these depositions. If the matter is tried in London, Zapata's American lawyers will have to attempt to communicate by letter, or conference, or probably both, to Zapata's London barristers and solicitors the information, gleaned in hundreds of hours of investigation, which is not in the depositions. The expense involved would be very heavy. (App. 155)

2. Unless Unterweser's motion to stay is denied and Unterweser is enjoined from further proceeding with its London suit pending final determination of the Tampa proceedings, if the London suit goes to trial, Zapata hopes to produce in person, at that trial:

Zapata employees:

1. Hoyt Taylor, Vice President and Chief Engineer
2. L. V. Whittington, Manager of Operations
3. Wiley C. Fenner, Senior Drilling Superintendent
4. James Booth, Engineer
5. Oscar Willard, Maintenance Superintendent

6. Kenneth Price, Motorman

7. Billy C. Burke, Mechanic-Electrician

Others

8. Noel Thompson, Marine Surveyor

9. John H. W. Hellendoorn, Marine Surveyor

10. A representative of Breit Engineering Company, a naval architectural and engineering firm

11. A representative of R. G. LeTourneau, Inc., regarding the design and construction of the CHAPARRAL

12. A representative of R. G. LeTourneau, Inc., regarding work done in preparation for the voyage of the CHAPARRAL

13. Sam Bryan, Metallurgist

14. Joseph Tynan, Marine Surveyor

These 14 witnesses reside in the United States Gulf area, wtih the exception of Hellendoorn who resides in New Jersey. They are material witnesses as to plans and preparations for, or the events of the voyage, or the condition of the CHAPARRAL before or after the voyage.

The round trip air fare, Houston to London, tourist class, is $572.80. The round trip fare, Tampa to London, tourist class, is $527.20. In contrast, a round trip air fare, Houston to Tampa, tourist class, is $109.20. The cost per day for a commercial hotel plus meals in London is about $20. Zapata estimates the cost of air fares and lodging and subsistence incidental to producing the above-mentioned witnesses at a London trial would be $10,000. (App. 156-157)

> 3. Zapata is engaged in offshore drilling operations at locations in the Indian Ocean, Gulf of Mexico, Danish North Sea, coastal waters of Africa and South America. Zapata witnesses, Taylor, Whittington, Fenner, Booth, and Willard, are key men of managerial status in the Zapata organization, and it would be extremely inconvenient and disruptive of Zapata's offshore drilling operations to send them to London to give evidence. (App. 157)

The district court's finding that the "balance of convenience is strongly in favor of litigation in this forum" (Pet., App. D, D-6) is supported by substantial and undisputed evidence.